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ALEXANDER L. STEVENS
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No. 83-619

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

JOSEPH C. GRAVES,

Petitioner,

v.

THE LEXINGTON HERALD-LEADER COMPANY,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

**PETITIONER'S SUPPLEMENTAL
AND REPLY BRIEF**

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Petitioner replies briefly to the second argument in Respondent's Brief in Opposition, and comments upon the effect of this Court's decision in *Bose Corp. v. Consumers Union of United States, Inc.*, No. 82-1246 (April 30, 1984).

I.

Respondent's second argument (Brief

in Opposition at 13-17) seeks to defend the Kentucky Supreme Court's definition of the actual malice standard as requiring plaintiff to prove "deliberate fabrication." Pet. at 17-20. Yet in *Herbert v. Lando*, 441 U.S. 153, 160 (1979), this Court reiterated its holding that actual malice encompassed more than deliberate falsehood. The Court held that it was sufficient that "the alleged defamer of public officials ... have reason to suspect that his publication is false." And see the cases cited at Pet. 18-19. Moreover, in a recent state Supreme Court decision, *Green v. Northern Publishing Co., Inc.*, 655 P.2d 736 (Alaska 1982), the court held the requirement of actual malice satisfied if "the defendant entertained serious doubts about the truth of its assertion" *Id.* at 743, and held it sufficient that "the writers ... knew of substantial

evidence" which contradicted their published assertions, *id.* at 742.

This case falls squarely within that definition of actual malice: including reckless disregard of whether the story was false or not. Here the testimony was specific that the writer himself had doubts as to the accuracy of the story he had written, and which the respondent publisher rushed into print; impelled, in the words of one of the newspaper's editors, by a "stampede instinct." Pet. at 6.

II.

These same facts also call for this Court's review in light of its decision in *Bose*. As the Court noted, "the constitutional values protected by the [*New York Times*] rule make it imperative that judges -- and in some cases judges of this Court -- make sure that it is *correctly* applied." Slip op. at 16 (emphasis added). Here, as in *Bose* and the cases which *Bose* follows,

the Court should conduct, as it "has regularly conducted [,] an independent review of the record ... to be sure that the speech in question actually falls within the unprotected category" *Id.* at 19. Here, unlike in *Bose*, "the evidence in the record ... is of the convincing clarity required to strip the utterance of First Amendment protection," and hence "[j]udges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice'." *Id.* at 24-25.

Thus, in *Bose* this Court examined the record in order to find that the Court

of Appeals in that case was correct in finding that the evidence there lacked ~~in~~ *the* convincing clarity necessary to support a finding of actual malice. Slip op. at 25-28. The Court found that the evidence did "not establish that he [the respondent's audio engineer] realized the inaccuracy at the time of publication," *id.* at 26, and hence the statement was "the sort of inaccuracy that is commonplace in the forum of robust debate" *Id.* at 27.

In this case, quite to the contrary, the author of the article which defamed a candidate for public office -- and which was influential in the results of the election, Pet. at 24-25 -- admitted not only that he did not understand the complex subject matter about which he wrote, but that he had specific doubts about the

accuracy of what he had written *before* it was published. *Id.* at 6-7. Here too, the publisher also was aware that the principal sources of the article were political opponents of the petitioner and were "out to get" him. *Id.* at 7.

Taken together, these facts more than satisfy any actual malice standard short of that which the Kentucky Supreme Court demanded: "deliberate fabrication." A ~~pro-e~~ proper application of the standards which this Court announced anew in *Bose*, and the proper instruction of both federal appel-

late courts and state courts of last resort, which is one of this Court's great functions, compel review of this case.¹

Respectfully submitted,

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¹ As noted, this case also presents an important constitutional question not present in *Bose* and, as far as petitioner is aware, one that this Court has never yet addressed; that is, the effect to be given, in a defamation case in which an election is involved, to the First Amendment interests implicated by the right to vote. See Pet. at 7, 24-25.